Supreme Court, U.S.
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No. 10-316

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In The

Supreme Court of the United States

ROBERT J. GAGALIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the circuit court erred in denying a Certificate of Appealability even though, on the focal point of the matter, the district court observed, *"And I think that's one of the areas in which we disagree and I think it's the central issue that I've been trying to get at for several days. Now, I acknowledge I could be wrong about that. It's possible."*

2. In a case in which one law firm represents two clients who have adverse interests, whether there is an impermissible actual conflict of interest when the law firm fails to utilize defense strategies for one client when these defense strategies could have exposed the other client to harm.

3. Whether petitioner was denied effective representation of counsel from violations of the New Hampshire Rules of Professional Conduct relating to conflicts of interest.

4. Whether conflicts of interest and other aspects of ineffective assistance of counsel invalidated petitioner's waiver of his rights to appellate and collateral review.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert J. Gagalis respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A. The Judgment of the United States Court of Appeals for the First Circuit, dated January 22, 2010, appears at Appendix A to the petition; this Judgment is unpublished. The Judgment was a denial of a motion for certificate of appealability following denial of a petition for relief filed in the district court pursuant to 28 U.S.C. § 2255.

B. The Order of the United States District Court for the District of New Hampshire, dated October 27, 2009, appears at Appendix B to the petition; this Order is unpublished. The district court order determined that petitioner's right to seek collateral review was barred by a waiver of his right to collateral review.

The district court order denying the petition for relief filed in the district court pursuant to 28 U.S.C. § 2255 was oral, stated on the record on July 21, 2009, and entered on August 19, 2009.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). In *Hohn v. United States,* 524 U.S. 236, 118 S. Ct. 1969, 141 L.Ed.2d 242 (1998), this Court found that it has jurisdiction to review circuit court denials of a certificate of appealability under 28 U.S.C. § 1254(1).

An extension of time to file the petition for writ of certiorari was granted to and including June 21, 2010; the extension was granted on May 19, 2010 in response to Application No. 09A1112.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253

> **(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district

judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

At various stages through the proceedings below, petitioner Robert J. Gagalis was denied due process because his law firm also represented a client whose interests proved to be adverse to his own.

In July 2001, petitioner Robert J. Gagalis, a man with a spotless, decades-long career in corporate management, joined Enterasys. Unknown to Gagalis, Enterasys was a company that had a history of entering into transactions that improperly characterized revenue for its quarterly reporting. Those who were primarily responsible for institutionalizing such transactions were never charged. Instead, Gagalis, the newest member of Enterasys's management, who was ignorant of the criminality at hand and present only during the last weeks of the illegality, received a 138-month sentence, more than any other defendant in the matter.[1] Gagalis had been convicted at trial and in an unusual sentencing procedure, he agreed to this harsh sentence *and* waived his rights to collateral and appellate review.

On July 7, 2008, Gagalis filed a motion to vacate and set aside his conviction and sentence pursuant to 28 U.S.C. § 2255 ("2255 motion") in the United States District Court, District of New Hampshire. The 2255

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[1] Gagalis arrived at Enterasys on July 16, 2001. The conspiracy, accounting, securities and wire fraud charges for which he was convicted occurred between June 2001 and October 16, 2001.

motion was based on Gagalis's conviction in denial of his rights under the United States Constitution. Central to the 2255 motion was the fact that Gagalis was represented through pretrial proceedings, trial and sentencing by a law firm that was impermissibly conflicted because the firm represented someone with competing interests and the joint representation adversely affected Gagalis's defense.

Gagalis's counsel also provided erroneous and objectively unreasonable representation in the following ways:

- Advising Gagalis to accept a post-conviction sentencing stipulation that resulted in receiving a higher sentence than the Court intended, and waiving his rights to appeal and collateral review in the process;
- Advising Gagalis that he should not file an appeal because the mere filing of an appeal would conclusively breach the stipulation and result in the imposition of the longest possible sentence;
- Advising Gagalis to enter into a joint defense agreement with co-defendants that had contrary interests;
- Failing to diligently investigate the case;
- Failing to seek the recusal of the office of the United States Attorney for the District of New Hampshire; and

- Advising Gagalis that he should not testify, not put on a defense of any type, and not engage in vigorous cross-examination of prosecution witnesses.

Gagalis was also denied a fair trial due to governmental misconduct in violation of his rights under the Fourth, Fifth and Sixth Amendments. The government went beyond the bounds of fairness in the following ways:

- Interfering with the payment of attorney fees to the defense;
- Interfering with the defense's access to prosecution witnesses, which resulted in the witnesses being unavailable to the defense;
- Wrongfully interfering with parallel SEC proceedings resulting in delays in the defense gaining information; and
- Withholding exculpatory information.

Unfortunately, relying on his conflicted counsel, Gagalis orally agreed at sentencing not to file an appeal or collaterally attack his conviction or sentence. This waiver became the focus of the district court proceedings.

After briefing of the 2255 motion, the district court set an evidentiary hearing to determine whether the waiver of collateral review was valid. This hearing was held on July 20 and 21, 2009. Four witnesses were called to testify: Gagalis's counsel,

James Rehnquist and Cathy Green, Gagalis himself and Assistant U.S. Attorney William Morse.

The testimony most relevant to this petition follows:

Rehnquist's testimony took place on July 20, 2009. The testimony began concerning the fact that his law firm, Goodwin Procter LLP (Goodwin), represented Enterasys executive Gagalis in his criminal case and in a Securities and Exchange Commission (SEC) matter, and Goodwin also represented Daniel Harding, an executive at Cabletron (which changed its name to Enterasys before Gagalis joined), in the same SEC matter. Harding had a role in designing and promoting transactions that were materially similar to the transactions for which Gagalis was convicted. RTI 27-37, 55-56[2]

By way of background, a series of communications involving Rehnquist showed that he had early knowledge of Harding and that he did not share this knowledge with Gagalis until he was forced to by the government's own actions. These communications are

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[2] Citations to the evidentiary hearings of July 20 and 21, 2009 are denoted as "RTI" for the July 20th session and RTII for the July 21st session, with page and line notations following. Excerpts from the transcripts for these hearings are found in Appendix C and Appendix D.

part of the record of the hearing and the record of the 2255 motion.[3] The communications went as follows:

> On January 25, 2005, James Rehnquist, the lead attorney for Gagalis at Goodwin, sent Gagalis an email apprising him of a "recent comment" from Morse. Rehnquist stated that one of his partners, David Apfel represented "Riverstone exec Dan Harding in connection with the government's investigation of Riverstone, which is ostensibly an entirely separate investigation from the investigation that lead to your indictment, and which is still underway. The SEC has opened a file with a separate SEC file name (Riverstone, not Enterasys) for the investigation, and the SEC is coordinating not with Morse but rather with the U.S. Attorney in San Francisco."[4] Rehnquist acknowledged learning about Goodwin's representation of Harding "several weeks after" he began representing Gagalis.[5] Rehnquist stated that he and Apfel

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[3] The communications are found at full length in Appendix E.

[4] Contrary to Rehnquist's statement, the matter involving Harding was entitled *In the Matter of Enterasys Networks*. The "entirely separate" investigations were more interrelated than Rehnquist stated because it was actually ***one matter***, involving investigation of the three-corner deals undertaken by Enterasys. Rehnquist was clearly misleading Gagalis in suggesting that the matters were separate.

[5] Rehnquist was being hired in May 2004 and formally appeared on Gagalis's behalf in mid-June 2004. It follows that Rehnquist learned of the potential conflict over six months before and likely had entered into his representation of Gagalis

(Continued on following page)

had then agreed that there was not "much potential for a conflict of interest" but that "out of an abundance of caution" they "put up a 'Chinese Wall' within the firm, so no one working on the Harding matter has any substantive communication with anyone on your team."

Rehnquist also stated that, "the issue surfaced in a mild way. Morse (for reasons David and I have not discussed) called Apfel out of the blue a week or so ago, and in the, resulting conversation, which took place last Friday, expressed 'concern' when he learned that David was also at Goodwin. He indicated that he may communicate his concerns in a letter to one or both of us." Rehnquist continued by stating that if there were "an actual conflict – say, if Harding were to end up as a government witness in your trial – is extremely unlikely (and could probably be overcome by waivers from both you and Harding in any event) Morse may attempt to create one." Rehnquist stated that if a conflict arose that was "not waivable, David has agreed that he will withdraw from representing Harding." Rehnquist also said, "Although it is unlikely, Morse could even attempt to disqualify me – the sincerest form of flattery – although such motions are frowned upon by judges and this one would surely be

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on the record of this case knowing of the potential conflict, but not advising Gagalis until this email.

a loser. In any case, I am confident that this issue will not have any adverse effect on my representation of you." Rehnquist's email did not mention that a conflict may arise from the possibility that either Gagalis or Harding might receive some leniency for cooperating against the other.

In a reply email, on January 25, 2005 at 2:09 PM, Gagalis stated, "Since your partner is willing to withdraw if a conflict, I do not see any issue." Later, at 3:26 PM, Gagalis emailed Rehnquist and stated, "I seem to recall that Harding may have had some role in the investment deals prior to my joining ETS [Enterasys] – He may have even reported to Patel or Jaegar.[6] If Patel, Kirkpatrick and Jaegar are indicted, could be a stronger possibility that Harding could end up testifying at my trial."

Also on January 25, 2005, Morse sent Rehnquist a letter advising him that "an actual, or at least a serious potential, conflict of interest has arisen . . . " This conflict centered on the fact that Rehnquist from Goodwin's Boston office represented Gagalis, and Apfel and R. Todd Cronan, also of Goodwin's Boston office represented Harding.[7] Morse's

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[6] Rehnquist failed to ever follow up on Gagalis's comment to determine if Gagalis had information to offer the government about Harding, Patel or Jaeger.

[7] Harding was a Vice President in the business development group at Cabletron and later with Riverstone. He was

(Continued on following page)

> January 25th letter alerted Rehnquist that Goodwin's "duty of loyalty would be seriously divided if your partners were called upon to advise Mr. Harding about whether to accept any offer of leniency or immunity in exchange for his cooperation where the decision to accept any such offer could adversely impact Mr. Gagalis . . . " Morse also stated that the joint representation could impair the cross-examination of Harding if he were to be a witness.
>
> Morse continued, "Your firm's joint representation of Mr. Harding and Mr. Gagalis also creates the potential for a collateral attack to any conviction of either client on the grounds of ineffective assistance of counsel."
>
> In the next paragraph, Morse directed Rehnquist to Rules 1.7 (Conflict of Interest: General Rule), 1.10 (Imputed Disqualification: General Rule) of the New Hampshire Rules of Professional Conduct concerning conflicts of interest. Morse also directed Rehnquist to Rule 1.3 (Diligence) and Rule 1.6 (Confidentiality of Information).

In his testimony about the conflict of interest rules, Rehnquist acknowledged that he did not recall ever referring to the New Hampshire Rules of Professional Conduct, only that he was familiar with "their

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subject to an SEC investigation concerning his possible complicity in improper revenue recognition deals during the period including March 2000 through December 2001.

Massachusetts analogs." Rehnquist did not obtain any written waiver from Gagalis and he did not discuss the matter with his firm's ethics lawyer.[8] RTI 71-72.

> Ultimately, Morse requested that the matter be resolved by having Goodwin withdraw from representation of either or both clients. Morse stated, "In the event, you and your partners do not agree to terminate the joint representation of Mr. Gagalis and Mr. Harding, a judicial hearing into the potential conflict of interest would be necessary to address the issues discussed herein and make an appropriate record before the prosecution and investigation proceed much further."
>
> On January 26, 2005, Rehnquist sent Gagalis a copy of Morse's January 25th letter.
>
> On February 1, 2005, Rehnquist emailed Gagalis and stated:
>
> > "The plan is that Harding will retain new counsel to advise him in his dealing with Morse and the USAO-NH. This should address both of Morse's concerns. My partners are still discussing with Harding but do not anticipate any problems. I spoke to Cathy [Green] about forcing Morse's hand by filing a

[8] Pertinent excerpts from the New Hampshire Rules of Professional Conduct are found in Appendix F.

> discovery motion, and she agrees with the strategy – we should have a letter (which must precede a motion) ready to go shortly."

On February 8, 2005, Rehnquist wrote to Morse in response to his January 25th letter. While not conceding that there was an actual or potential conflict, Rehnquist stated that Goodwin would not be representing Harding in relation to dealings with Morse's office. Rehnquist wrote that he did "not know any of the details of this arrangement, but I expect that it would allay the concern expressed in your letter about the advice Mr. Harding might receive if he were to receive any offer of leniency or immunity in exchange for his cooperation in your case." Rehnquist stated further that if Harding were called as a witness, Green would cross-examine Harding.

On February 17, 2005, Morse again wrote to Rehnquist about the Harding matter. Morse stated his continued concern that Goodwin had not withdrawn from representation of Harding. Morse observed that, "one or both clients is, or might be, in a position to obtain leniency by providing information that could directly or indirectly inculpate the other." Morse stated that, "a judicial hearing will be necessary to vet the conflict issues in the event your firm does not withdraw completely from its representation of either Mr. Harding or Mr. Gagalis."

On February 25, 2005, Rehnquist replied to Morse by a faxed letter and claimed that there was no danger of a conflict because Harding would have separate counsel if he were to cooperate against Gagalis, and because the possibility that Gagalis could obtain "leniency by cooperating against Mr. Harding . . . strikes me as utterly fanciful."[9]

On March 1, 2005, Morse wrote to Rehnquist and reiterated his objection to Goodwin's "dual representation" of Gagalis and Harding. As to the possibility of Gagalis gaining leniency through cooperation, Morse observed:

> "With respect to your characterization of any government concern about Mr. Gagalis cooperating against Mr. Harding as 'fanciful,' please note that the government fully understands that Mr. Gagalis is intent on having his day in court. The government has never suggested that there was any likelihood that Mr. Gagalis would actually cooperate against Mr. Harding. Mr. Gagalis' potential cooperation is significant mainly because, if convicted at trial, Mr. Gagalis could claim that he did not receive the benefit

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[9] Rehnquist made this comment despite Gagalis's January 25th email in which he stated, "I seem to recall that Harding may have had some role in the investment deals prior to my joining ETS [Enterasys] – He may have even reported to Patel or Jaegar."

> of your firm's unbiased advice concerning the respective benefits and risks of cooperating versus contesting the Grand Jury's indictment."
>
> Gagalis did not receive a copy of Morse's March 1, 2005 letter from Rehnquist until May 2008, some 17 months after his trial, and 9 months after he had begun his sentence. During the entire time he represented Gagalis, Rehnquist failed to explore whether Gagalis had information about Harding and Riverstone that would assist the government. Nor did Gagalis's counsel adequately explore whether Gagalis had information that would assist the government about anyone else at Enterasys, Cabletron or Riverstone who was not yet indicted.

Rehnquist acknowledged that the billings paid to Goodwin on the Gagalis matter exceeded $4,000,000.00, saying, "I wouldn't dispute that." Rehnquist also agreed that, as partners at Goodwin, he and Apfel were each "expected to bring in substantial business." RTI 44:17-45:3

Rehnquist also testified about the possibility that the history of investment deals at Cabletron and Enterasys could have been a feature of Gagalis's defense. RTI 81-85 Gagalis had told Rehnquist that he thought the deals were legal in large part because they had been going on so long and he was assured by people that the fact that they were going on historically was part of the reason he thought they were legal. RTI 86:2-8

Rehnquist was aware that Harding was to some degree involved in the prior history of the investment deals. RTI 94:15-19 A member of Gagalis's defense team would have been aware that Harding was "in charge of investment deals in which Cabletron would invest in a company and the company would in turn buy product from them." RTI 124:6-13 Such deals included instances where the investment would not have occurred unless the investee company also bought product from Cabletron and that the government contended that such deals would be illegal if the revenue was booked, published and recorded. RTI 125:1-126:10, 127:2-17

Rehnquist agreed that putting on a defense in which Gagalis said that he "thought the deals were legit because they had been going on for years" would implicate Harding in the deals "in a nonperjorative [sic] way." Rehnquist stated that he did not know if he could have put such a defense on if had also represented Harding. RTI 95:24-96:16 He later said he probably could have put on such a defense because it did not cast aspersions on anything that Harding did.[10] RTI 97:7-15

Harding later went to Riverstone, a subsidiary of Enterasys, and was involved in a deal with Worldlink – a company whose deals were part of the case against Gagalis. RTI 128:4-16 Rehnquist was aware

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[10] This was a self-serving statement by Rehnquist that is contradicted by the facts at hand.

that Riverstone was doing three-corner deals (as in the case against Gagalis) under Harding. RTI 131:6-132:2

Rehnquist agreed that he had access to an FBI report that described Harding's office in a secure area with Piyush Patel, David Kirkpatrick and Eric Jaeger (who were arguably the architects of the allegedly illegal schemes). Rehnquist did not see a conflict because he would not have used a defense implicating former Cabletron people in a pejorative way. RTI 134:22-135:17

Rehnquist agreed that Gagalis "was informed particularly that three-party deals were done in the past and he thought that KPMG had okayed them for revenue recognition." RTI 170:22-170:2 However, Rehnquist successfully moved to exclude reference to the historical transactions. RTI 177:23-179:22

Gagalis testified on July 21, 2009. At the outset of Gagalis's testimony, he reviewed four restated transactions that were reviewed with Rehnquist the day before. These deals related to Centricity, Converge Labs, Global Wireless and Megaworld transactions in which Harding was in charge. Other deals in which Harding was involved were also referred to. RTII 10:14-16:23

Gagalis met with a variety of people during the hiring process at Enterasys, including Piyush Patel, David Kirkpatrick, Eric Jaeger, Gerry Haines, Henry Fiallo and others. Gagalis was given false assurances about the company relating to revenue projections

and channel stuffing. RTII 20:16-26:1 The business development group handled company investments, including minority investments; Harding was in charge of the business development group at Cabletron. RTII 30:21-32:2

Gagalis first heard about three-corner deals in mid-August 2001 and continuing to late August 2001, from a variety of people, including Tom Eggemeier and Jack Huffard at business development, Tom Loureiro and from others in the finance department. Gagalis was told that the company did these deals in the past, including HealthCite and Spectrum Access. Gagalis was under the impression that the deals had been going on for some time and they were "standard protocol." RTII 33:21-36:21

In late August 2001, Gagalis spoke with Jaeger about revenue recognition for two transactions in which Jaeger said the deals were lawful (Three Pillars and Digital Mojo). Jaeger explained that the three-corner deals were legitimately booked because the risk of loss was with the distributor. Gagalis was aware that the company had done 50 or 60 investment transactions in the past and that there "were very, very material amounts of revenue recognized in connection with investment transactions in the past." So, his mindset was that the deals were okay. RTII 37:15-39:5 Gagalis did not pursue the issue with outside accountants because he did not see the issue as potentially questionable. RTII 41:23-42:2, 43:2-21

Gagalis also testified about a September 4, 2001 email from Jaeger and his response to Jaeger. Gagalis received the email while on vacation and sent a quick response. Gagalis explained his response saying that he had made the decision not to collapse certain transactions having decided that disclosure was not necessary. He said he also wanted to see the information going to KPMG before it was provided to make sure the packages were complete. RTII 64:8-66:20 Gagalis recalled that there was no evidence presented at his trial revealing his perspective on the September 4th email. RTII 135:8-12

Gagalis testified that Craig Benson was not happy with KPMG, the company auditor, because they were too "nitpicky," "confrontational" and because they had large billings. Others made similar comments about KPMG. RTII 93:22-94:16

Gagalis also recalled that, according to Mr. Boyer's expert testimony at trial, among the issues that were relevant to determining whether, or to what extent, revenue could be booked was the valuation of the investee company. RTII 33:4-20 Harding admitted in his deposition that he was responsible for preparing internal valuations. RTII 57:17-58:17 Gagalis learned from Jaeger and others that Harding had a role in the three-party deals that had been going on for some time before his arrival and that those deals were restated for the "exact same reason" that he was being charged. RTII 60:6-61:1

Gagalis brought a colleague, Rip Haak, to Enterasys. In mid-to-late fall 2001 Gagalis asked Haak to examine growing account receivable balances in the Asia Pacific region, which led to Haak discovering improprieties in the Ariel transaction. Gagalis said he would not have had Haak look into these matters if he had been concerned about the illegality of the Ariel transaction. Haak was not called to testify at Gagalis's trial. RTII 72:23-73:20

Gagalis denied ever having Gail Spence backdate any documents and that Spence lied about it in trial. RTII 157:12-20

Cathy Green testified that there was a situation involving Final Mile, a company related to Enterasys, which received a million dollars of inventory, which was immediately returned to Enterasys, and the transaction was intended to allow Spence to meet her revenue recognition numbers. Green did not cross-examine Spence on Final Mile.[11] RTII 112:5-18

In discussing the lead up to his waiver of appellate rights and collateral review, Gagalis stated that there was no discussion with his counsel about a conflict of interest claim and that he never knew that a conflict of interest could be part of an ineffective assistance of counsel claim. RTII 141:22-143:13

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[11] Final Mile constituted part of the culture of misconduct at Cabletron and Enterasys that pre-dated Gagalis.

Morse was called to testify about the series of letters that were exchanged between Morse and Rehnquist.

At the end of testimony, argument was taken, which included numerous discussions between the Court and counsel. The issue was whether Gagalis's counsel was laboring under an actual conflict in which his counsel "might plausibly have pursued an alternative defense strategy, and that the alternative strategy was in conflict with, or may not have been pursued because of, [the lawyer's] other loyalties or duties." *United States v. Ramirez-Benitez*, 292 F.3d 22, 29 (1st Cir. 2002). An actual conflict of interest would have invalidated the waiver of petitioner's collateral review and appellate rights.

The following exchange on this issue occurred on July 21, 2009:

> THE COURT: That's exactly what I'm telling you you need to focus on. You see, you keep coming back to highest traditions of the bar,[12] and I'm saying to you and my example demonstrates for you, that merely showing to me that there shouldn't have been simultaneous representation doesn't get you the win. I'm saying let's get beyond that issue and focus on what they would have done differently

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[12] This reference pertains to an apparent series of violations of the New Hampshire Rules of Professional Conduct by Goodwin from its joint representation of Gagalis and Harding.

in Gagalis's trial. That's what the standard is that you drew to my attention.

MR. ARTAN: The restatements, Final Mile, discussions about Jaeger, all those things tend to incriminate Harding.

THE COURT: That's, okay, and that's I think, that is the point where I think it's a legitimate disagreement that we have. All this other stuff is side show. This is what the whole thing boils down to. As I said on the very first day is, I think you need to have evidence that was not put on the plausibly could have been withheld because of the existence of a conflict. Your view of that is anything, any kind of evidence that might have been put on that in any way, shape or form might have somehow eventually in some future proceeding led to something that could be damaging to Harding, is sufficient to satisfy that standard, and I think something more than that is required. And I think that's one of the areas in which we disagree and I think it's the central issue that I've been trying to get at for several days. Now, I acknowledge I could be wrong about that. It's possible. But I think that's where the focus needs to be. And you've articulated your view on that point I think quite well. It is – any evidence about deals before Gagalis came there could potentially lead to further investigation that might uncover something bad about Harding and therefore Rehnquist, because his firm was representing Harding, had a duty to stay away from that and he

> couldn't simultaneously offer that evidence and stay away from that. I look at that evidence and say, I couldn't find anything that is sufficiently tied to Harding that could potentially lead to anything that could be damaging to say that it is even plausible that the evidence was avoided for that reason. Instead, I think there were very sound reasons why that evidence was not admitted and that have nothing to do with the conflict. So I think under those circumstances you don't satisfy that element of the test, and that's I think where we disagree.
>
> MR. ARTAN: Well, judges have disagreed with me before, your Honor, I'm sorry to say.
>
> THE COURT: But as long as we're talking on the same page.
>
> MR. ARTAN: That's the same page, your Honor. RTII 220:24-222:24

On July 21, 2009, at the conclusion of the evidentiary hearing, the district court found that petitioner's collateral review waiver at the time of his sentencing was valid; based on this finding the district court dismissed petitioner's 2255 motion. The district court made no findings as to the other contentions in the 2255 motion, relying only on the waiver issue.

Petitioner filed a timely Notice of Appeal and moved the district court for a certificate of appealability ("COA"). On October 27, 2009, the district

court denied the motion for a COA despite having made the following observation about the key point of the hearing: "*And I think that's one of the areas in which we disagree and I think it's the central issue that I've been trying to get at for several days. Now, I acknowledge I could be wrong about that. It's possible.*"

Petitioner then sought leave to appeal under 28 U.S.C. § 2253, and on December 14, 2009, filed a motion for issuance of a COA with the United States Court of Appeals for the First Circuit. On December 23, 2009, the government moved for an extension of time to respond, which was granted to January 19, 2010 and then extended to January 22, 2010. On January 11, 2010, the supplemental record of three boxes of documents arrived at the circuit court.

On January 22, 2010, the Court of Appeals denied the motion for a COA and terminated the appeal. The government has never filed its response.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

The questions at hand implicate important issues of federal law that should be settled by this Court. *See* Rule 10(c), Supreme Court Rules.

The denial of a COA by the district court and by the circuit court amount to a complete abrogation of the statutory and common law standards set for such

determinations. Petitioner, who was denied unconflicted counsel, has clearly "made a substantial showing of the denial of constitutional right" as stated in 28 U.S.C. § 2255(c)(2).

Once the jurist deciding the matter acknowledges that he may be wrong about the central issue being decided, the need for issuance of a COA becomes self-evident. If the deciding jurist found the matter debatable, "jurists of reason" would surely find it debatable, thus meeting the requirements set forth in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The abrogation of this standard gains importance because the denial of the COA foreclosed examination of an issue with perhaps greater importance – the extent to which a law firm can represent clients with competing interests. In an age in which law firms are increasing in size and reach, clarity is needed to protect clients and to provide the law firms a correct understanding of their limits.

For the district court, and the circuit court by ratification, law firms can *willfully ignore and violate ethical rules* and law firms can even represent one client in an undefined way that *may lead to harm their other client, thereby rendering such rules essentially without meaning in a court proceeding.* Apparently the boundary, and the proper role of the rules of professional conduct in determining that boundary, is unclear. For the good of the bar, the courts and clients, this issue warrants clarification.

Petitioner's waiver of collateral rights was invalid because an actual conflict of interest existed in that his counsel "might plausibly have pursued an alternative defense strategy, and that the alternative strategy was in conflict with, or may not have been pursued because of, [the lawyer's] other loyalties or duties." *United States v. Ramirez-Benitez*, 292 F.3d 22, 29 (1st Cir. 2002).

The definition of what constitutes an actual conflict exists became the point of contention and disagreement. On that point, the district court observed, *"I think, that is the point where I think it's a legitimate disagreement that we have. All this other stuff is side show. This is what the whole thing boils down to. . . . And I think that's one of the areas in which we disagree and I think it's the central issue that I've been trying to get at for several days. Now, I acknowledge I could be wrong about that. It's possible."* RTII 220:24-222:2

Evidence relating to the historical deal-making at Cabletron and Enterasys could never have been presented on the petitioner's behalf without compromising Goodwin's duty of loyalty to Harding. An actual conflict of interest therefore existed. "Jurists of reason" at a minimum "would find it debatable" whether petitioner's waiver was valid. It follows that, at a minimum, a COA should have been granted on the issue as to whether petitioner's collateral review waiver was valid. However, the record is already well enough established to show that an actual conflict of

interest existed that invalidated petitioner's waiver of appellate and collateral rights.

II. THE CERTIFICATE OF APPEALABILTY STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sets forth the standards and procedures utilized in collateral review of state and federal criminal proceedings. 28 U.S.C. § 2253, a part of the AEDPA, limits a defendant's right to appeal as follows:

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In *Slack v. McDaniel,* 529 U.S. 473 (2000), the Supreme Court determined when a COA must be issued. In *Slack,* the Supreme Court evaluated situations in which constitutional claims are denied on the merits by the district court and in which claims are denied on procedural grounds as follows:

> "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard provided in *Barefoot,* 463 U.S. at 893, and n. 4, and adopted by Congress in AEDPA. Where a plain procedural bar is present and the district court is correct

> to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted." *Slack v. McDaniel, supra,* at 484.

In the context at hand, applying the *Slack* analysis, the question would be whether "jurists of reason would find it debatable whether the district court was correct." The ineffective assistance of counsel is clearly a constitutional claim under the Sixth Amendment.[13] As stated below, whether there was an impermissible conflict is clearly a question that jurists of reason would find debatable.

III. THE COA SHOULD HAVE BEEN ISSUED TO DETERMINE WHETHER PETITIONER'S COUNSEL WERE IMPERMISSIBLY CONFLICTED

It is well settled that "[p]rejudice is presumed when counsel is burdened by an actual conflict of interest." *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *see also United States v. Cronic*, 466 U.S. 648,

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[13] In cases where the constitutional claims were not fully developed, the First Circuit has acknowledged that if a "petitioner's claim does not appear utterly without merit after a 'quick look', the COA can be granted and an incorrect procedural barrier removed, the matter then being remanded to give the district court first crack at the constitutional claim." *Mateo v. United States,* 310 F.3d 39, 41 (1st Cir. 2002).

662 n.31 (1984) (judiciary "presume[s] prejudice when counsel labors under an actual conflict of interest"). When a conflict of interest adversely affects a defendant's lawyer's performance, reversal is required. *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002).

An actual conflict of interest exists, and ineffective assistance of counsel is shown, if a defendant's lawyer "might plausibly have pursued an alternative defense strategy, and that the alternative strategy was in conflict with, or may not have been pursued because of, [the lawyer's] other loyalties or duties." *United States v. Ramirez-Benitez*, 292 F.3d 22, 29 (1st Cir. 2002); *see also Reyes-Vejerano v. United States*, 276 F.3d 94, 97 (1st Cir. 2002); *Familia-Consoro v. United States*, 160 F.3d 761, 764 (1st Cir. 1998). Such a conflict arose in Goodwin's representation of Gagalis.[14]

A defendant "need not show that the defense would necessarily have been successful if it has been used, but merely that it possessed sufficient substance to be a viable alternative." *Brien v. United States,* 695 F.2d 10 (1st Cir. 1982). In fact, a "plausible" defense

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[14] *See also Carey v. United States*, 50 F.3d 1097, 1101 (1st Cir. 1995) ("[T]he right to effective assistance of counsel is *always* denied where an actual conflict of interest negatively affects a lawyer's performance. In other words, an actual conflict of interest is a special breed of ineffective assistance which is never harmless and is presumptively prejudicial.") (Bownes, J., dissenting in part) (citations omitted).

includes a defense that is "very likely unwise." *Reyes-Vejerano v. United States, supra.*

Goodwin labored under an impermissible conflict because of the firm's joint representation of Gagalis and Harding. The following factors, which would have *tended to implicate Harding,* should have been presented to the jury to adequately defend Gagalis, but were not:

- When Gagalis arrived at Enterasys the company had historically been involved in many minority investment transactions in which invested funds were used to buy product, many of which involved Harding.
- These transactions had also been used by Cabletron and were being used at Riverstone, the company to which Harding had been transferred to from Cabletron – these were circumstances in which Gagalis could not have been involved.
- Gagalis was misled into thinking that the revenue recognition for these deals, again which historically involved Harding, were within legal definitions and were "standard protocol".
- The fact that over thirty investment transactions involving Harding, were all eventually restated. Harding was involved in the valuations of many of these deals.

- The extent to which Gagalis was misled into joining Enterasys by Fiallo, Benson, Patel, Jaeger, Kirkpatrick and Eggemeier, each of whom gave the company glowing recommendations, and hid the fact that the company, with Harding's involvement, had implemented protocols to enter into deals that improperly inflated its revenues; and that he obviously trusted these men, having accepted their overtures to join the company.

- Gagalis was misled by Benson and others into thinking that KPMG was overly intrusive and cumbersome in its approach, when in fact, Benson and others were anxious to fire KPMG to be able to more freely recognize revenue from the questionable deals, also put together with Harding's involvement; and that he accepted Benson's opinion in light of Benson's standing.

The government has contended in its case against Gagalis that the three-corner deals and investment for product deals were illegal. Because of this contention, regardless of whether the old deals were legal, Harding's counsel could never risk presenting evidence relating to these past transactions without placing Harding's interests at risk. Because Harding's counsel also represented Gagalis, there was an actual conflict.

To illustrate the point, one might ask if Harding's lawyer could rationally or ethically put Harding on

the stand to defend Gagalis and explain that the transactions were legal. No reasonably competent or ethical lawyer could do so because of the risk to Harding. Such evidence could never have been presented for Gagalis without compromising Goodwin's duty of loyalty to Harding.

Therefore, Gagalis "might plausibly have pursued an alternative defense strategy, and that the alternative strategy was in conflict with [Goodwin's] other loyalties or duties." The alternative strategy of putting on this defense was in conflict with Goodwin's duties and loyalties to Harding. It follows from *Ramirez-Benitez* that there was an actual conflict and therefore ineffective assistance of counsel. Jurists of reason would find this point debatable and a COA should issue.

IV. THE ETHICAL BREACH CONSTITUTED AN ACTUAL CONFLICT AND INEFFECTIVE ASSISTANCE OF COUNSEL

On the issue of lawyer's conflicts of interest, the Supreme Court observed that, "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988) The Supreme Court went on to cite Rule 1.7 of the ABA Model Rules of Professional Conduct and the corresponding California rules on the subject.

Ethical guidelines for lawyers illustrate the divided loyalty burdening Goodwin in its representation of Gagalis and Harding simultaneously:

Rule 1.7 of the New Hampshire Rules of Professional Conduct (which is the same as Rule 1.7 of the American Bar Association Model Rules of Professional Conduct), provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

> (4) each affected client gives informed consent, confirmed in writing.

The Ethics Committee Comment, states, in part:

> The requirements that a lawyer maintain loyalty to a client and protect the client's confidences are fundamental. Although both the former rule 1.7 and the current rule 1.7(b) allow a lawyer to undertake representation in circumstances when there is exists [sic] a concurrent conflict of interest, the lawyer should use extreme caution in deciding to undertake such representation. The lawyer must make an independent judgment that he or she can provide "competent and diligent representation" before the lawyer can even ask for consent to proceed. The court in subsequent proceedings can review such a judgment. *See Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987).

In evaluating the appropriateness of representation in a conflict situation under 1.7(b), the New Hampshire Bar Association Ethics Committee has used the old rules under the "harsh reality test" which states:

> "[i]f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent. If this "harsh

reality test" may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation. . . ." New Hampshire Bar Association Ethics Committee Opinion 1988-89/24 (http://nhbar.org/pdfs/f088-89-24.pdf).

This test has proven useful to practicing attorneys and retains its validity under the amended rules.

As discussed in Comment 17 to the ABA Model Rules, the determination of whether two clients are directly aligned against one another so as to give rise to a non-waivable conflict will require case-by-case analysis in the context of the particular circumstances. Other factors – including the availability of insurance, hold harmless agreements or indemnification agreements – may also be relevant in determining whether the interests of the clients are in reality "directly adverse" so as to preclude waiver of, or consent to, the conflict. However, even when third party payers or other financial protections eliminate the clients' financial exposure in litigation, there are claims (for example, assertions of comparative fault among professionals) in which the client, not the insurer, may have a strong personal interest in a vigorous defense of their work despite the fact that insurance will cover any judgment. This makes such concurrent representation impossible. In making these determinations,

the harsh reality test discussed above should be foremost in the attorney's mind.

ABA Formal Opinion 93-377, the ABA Ethics Committee, applying the ABA Model Rules, held that: if the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create a legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.[15]

The ABA Opinion goes on to require that even if the cases are not being litigated in the same jurisdiction, the lawyer should nevertheless attempt to determine fairly and objectively whether the effectiveness of her representation of either client will be materially limited by the lawyer's (or her firm's) representation of the other.

The opinion enumerates four factors to be considered by the lawyer in determining the existence of a substantial risk of adverse effect:

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[15] This opinion is found at Appendix G.

(1) whether "the issue is of such importance that its determination is likely to affect the outcome of at least one of the cases,"

(2) whether the determination of the issue in one case is "likely to have a significant impact on the determination of that issue in the other case,"

(3) whether there would be any inclination by the law firm to "soft pedal or deemphasize certain arguments or issues – which would otherwise be vigorously pursued – so as to avoid impacting the other case," and

(4) whether there would be inclination within the firm to "alter any arguments for one or both of the clients, so that the firm's position could be reconciled – and, if so, could that redound to the detriment of one of the clients."

The ethical breaches in this matter were blatant. Rather than risk losing over $4,000,000.00 in legal fees, Goodwin hid the conflict of interest from Gagalis until the government wrote to Rehnquist and complained of the apparent conflict. Rather than being candid with Gagalis, Rehnquist mis-characterized the Harding matter as "separate investigations." Rather than fully disclosing the conflicts at hand and obtaining a written waiver, Goodwin side-stepped the conflict and hoped it would go away. Rather than

presenting the obvious defenses on Gagalis's behalf, Goodwin abandoned the obvious, all to Harding's benefit.

Despite this shameful progression of deception and unethical behavior, the district court stated, "You see, you keep coming back to highest traditions of the bar, and I'm saying to you and my example demonstrates for you, that merely showing to me that there shouldn't have been simultaneous representation doesn't get you the win." The breaches at hand were not mere deviations from the "highest traditions of the bar," but were consistent with the lowest traditions of the bar, gravely undermined petitioner's defense and denied him counsel as required by the Sixth Amendment of the Constitution.

V. GAGALIS'S WAIVER WAS ALSO THE PRODUCT OF INEFFECTIVE ASSISTANCE OF COUNSEL AND IT SHOULD NOT BE ENFORCED

Waivers arising from the ineffective assistance of counsel have been invalidated by this Court and courts of appeal based on two alternative theories, either of which applies to the case at hand: First, such waivers are not considered to be knowing and voluntary because they arise from ineffective advice; and second, such waivers are deemed to be miscarriages of justice as a matter of public policy.

As to the first theory, ineffective assistance of counsel can negate a waiver's knowing and voluntary

quality. The Supreme Court has held that, "[a] decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside 'the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart,* 472 U.S. 52, 56 (1985) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)). *See also United States v. Andis*, 333 F.3d 886 (8th Cir. 2003) ["A defendant must enter into a plea agreement and waiver knowingly and voluntarily for these agreements to be valid. . . . There are many ways in which an agreement, or aspects of an agreement, could be entered into without the requisite knowledge or voluntariness. Examples include an agreement entered into upon the ineffective assistance of counsel." *United States v. Andis, supra* at 890 (citations omitted)].[16]

In *DeRoo v. United States,* 223 F.3d 919 (8th Cir. 2000) the Court of Appeals held that, "A defendant's plea agreement waiver of the right to seek section 2255 post-conviction relief does not waive defendant's right to argue pursuant to that section, that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel." *DeRoo v. United States, supra* at 923.

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[16] Courts of Appeals have viewed the enforceability of direct appeal rights in the same manner as waivers of collateral review. *See DeRoo v. United States,* 223 F.3d 919, 923 (8th Cir. 2000); *Jones v. United States,* 167 F.3d 1142, 1145 (7th Cir. 1999).

Other circuits are in accord. For instance, the Fifth Circuit observed, "We also note that a defendant may always avoid a waiver on the limited grounds that the waiver of appeal was tainted by the ineffective assistance of counsel." *United States v. White,* 307 F.3d 336, 339 (quoting *United States v. Henderson,* 72 F.3d 463 (5th Cir. 1995)); *see also United States v. Abarca,* 985 F.2d 1012, 1014 (9th Cir.), *cert. denied,* 508 U.S. 979 (1993) (waiver does not foreclose defendant's right to bring section 2255 motion for ineffective assistance of counsel); *United States v. Craig,* 985 F.2d 175, 178 (4th Cir. 1993) (per curiam) (holding waiver did not preclude motion to withdraw guilty plea due to ineffective assistance of counsel).

As to the second theory, waivers of ineffective assistance of counsel claims are also invalid because such a waiver is by definition a miscarriage of justice. If a defendant agrees to waive his right to challenge his conviction due to the ineffective assistance of counsel, it is against public policy to enforce such an agreement. As the First Circuit explained in the context of appellate waivers, "if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver. . . . This category is infinitely variable, but by way of illustration, we would include within it situations in which appellants claim . . . that the plea proceedings were tainted by ineffective assistance of counsel." *United States v. Teeter*, 257 F.3d 14, 25 & n.9 (1st Cir. 2001). This concept would be applicable to collateral review.

It follows that an agreement to waive judicial review should not be enforced in cases where a defendant is denied the full and effective assistance of counsel required by the Constitution. In *DeRoo v. United States, supra,* the Court of Appeals observed, "[j]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a plea agreement cannot be barred by the agreement itself – the very product of the ineffectiveness." [quoting *Jones v. United States,* 167 F.3d 1142, 1145 (7th Cir. 1999)].

The Court of Appeals for the Tenth Circuit observed, " . . . it is well-established that we will not enforce a waiver [of appellate or collateral attacks] that is the product of ineffective assistance of counsel." *United States v. Edgar*, 348 F.3d 867, 869 (10th Cir. 2003).

Gagalis never understood that the conflict of interest could be the basis for a claim of ineffective assistance of counsel. It is therefore clear that the waivers of appeal and collateral review arose from the ineffective assistance of counsel and it follows that such waivers should not be enforced.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL H. ARTAN
Counsel for Petitioner
Robert J. Gagalis

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 09-2145

ROBERT J. GAGALIS,

Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,

Respondent, Appellee.

Before

Lynch, Chief Judge, Boudin
and Stahl, Circuit Judges.

JUDGMENT

Entered: January 22, 2010

Robert Gagalis, a prisoner in federal custody, seeks leave to appeal, under 28 U.S.C. § 2253, from the district court's denial of his petition for relief from his federal conviction under 28 U.S.C. § 2255. The issue that he seeks to appeal is whether the district court erred in denying his section 2255 petition as barred by his waiver of the right to seek collateral review of his conviction and sentence. After reviewing the entire record of the section 2255 proceedings and

the relevant parts of the record of the underlying criminal proceedings, we see nothing reasonably debatable about the district court's decision to enforce Gagalis's waiver of collateral review. The court applied the correct legal standards in its well-reasoned oral decision denying the petition and in its comments during the two-day evidentiary hearing. And its underlying factual findings, which are amply supported by the evidence presented at the evidentiary hearing and by the court's own direct knowledge of what transpired at Gagalis's trial and sentencing, are not clearly erroneous or even arguably so. Accordingly, the motion for a certificate of appealability is *denied* and this appeal is *terminated.*

By the Court:

/s/ Margaret Carter, Clerk.

cc:
Michael Harry Artan
Stephen M. Rasche
Seth R. Aframe
Terry Lynn Ollila

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Robert Gagalis

v. Case No. 08-cv-269-PB

United States of America

ORDER

On July 21, 2009, I issued an oral order determining that Robert Gagalis had abandoned his right to challenge his sentence by entering into an appeal and collateral review waiver. (Doc. No. 24 at 223-233 (reproduced as Appendix A)). Gagalis seeks permission to challenge this ruling in a motion for certificate of appealability.

In denying Gagalis's motion, I found that his appeal and collateral review waiver was valid and enforceable. I rejected Gagalis's argument that the advice he received from counsel concerning the waiver was affected in any way by an impermissible conflict of interest. I also rejected Gagalis's argument that enforcement of the waiver would result in a miscarriage of justice because it would deny him the opportunity to prove that he had received ineffective assistance of counsel at trial. In reaching this conclusion, I received evidence with respect to Gagalis's underlying ineffective assistance of counsel claim and concluded that denying him the opportunity to prove his claim would not result in a miscarriage of justice

because Gagalis could not prove that his lawyers were subject to an actual conflict of interest that adversely affected their performance at trial. I based my ruling upon well-established case law that governs both the enforceability of appeal and collateral review waivers, *see, e.g., United States v. Edelen*, 539 F.3d 83, 87 (1st Cir. 2008), and ineffective assistance of counsel claims based on an asserted conflict of interest, *see, e.g., United States v. Ramirez-Benitez*, 292 F.3d 22, 30 (1st Cir. 2002).

Gagalis does not explain how I misinterpreted the applicable case law, nor does he call into question the fact-finding that underlies my ruling. In short, he does not come close to demonstrating that a reasonable jurist could disagree with my ruling that he is barred from challenging his sentence by the appeal and collateral review waiver. Accordingly, I deny Gagalis's motion for a certificate of appealability (Doc. No. 30).

SO ORDERED.

/s/ Paul Barbadoro
Paul Barbadoro
United States District Judge

October 27, 2009

cc: Stephen M. Rasche, Esq.
Michael Artan, Esq.
Terry Ollila, Esq.

APPENDIX A

[223] THE COURT: All right, let me explain in a little more detail why I'm reaching the conclusion that I'm reaching here. And I hope you understand this, Mr. Gagalis. I have, as I've expressed, I have sympathy for you and I personally bear you no ill will. I think that you're testifying sincerely today. I don't think you're an evil person, a bad person, even a dishonest person. I think that you are not accepting the reality of what it is you did and the fundamental problem in this case is that you are guilty of these crimes and you've not been able to come to terms with that. And I know and I think to some extent rightly you feel wronged by Mr. Fiallo and others that lured you into this business and you blame them, but I don't find tenable that these deals were appropriate, they clearly were not, and I think the evidence is quite strong and the jury got it right when they did find you guilty of these crimes. But I understand your response and I'm sympathetic to it.

I also, I think I made this clear at the time [224] of sentencing, I think the government took too harsh a view of you at the time of sentencing. Had I not been constrained by the deal that had been negotiated, I would have given a lower sentence than what the government was proposing. But the government and I often disagree. They thought certain people were less worthy of punishment in that case than I did. I thought some of them should have gotten higher punishments, but I went along with those deals. In your case I think a lower punishment would

have been appropriate for you had you not entered into that deal. Not a punishment where you wouldn't have been incarcerated. You would have had to serve a very long prison sentence, but shorter than the one you're serving now. So what I'm about to say has nothing to do with any views I have about you or even about your sentence. Had I been free to give you a lower sentence, I would have given you a somewhat lower sentence. But I have to view the merits of the legal issue that your lawyer has presented, and that's what I've struggled to do over the course of several days, and I think it's frankly out of compassion for you that I was willing to give your lawyer two days to try to present your case because I feel you haven't come to closure on this matter and you feel you needed your opportunity to have your say in court, and I was going [225] to give it to you, it took me a couple of days to do it, and I think I did give you a chance to express your views and to be heard about your views on these matters. But I have to focus on the legal issues, and as I've explained, your lawyer has argued that you should be freed from the appellate and collateral review waiver that you agreed to in this case because your lawyers were operating under a conflict of interest.

When I analyze that claim, I have to ask myself whether the appellate and collateral review waiver is otherwise valid and enforceable. In this case the parties do not disagree. It is clear and undisputed that you understood what you were doing, the rights that you were giving up, the consequence of your

decision, I carefully explored that with you, it's a matter not in dispute, and clearly the appellate waiver is enforceable unless there are unusual circumstances as to cause it to be unenforceable.

The only circumstance that has been recognized by the Court of Appeals as being a circumstance that might potentially apply in your case is a contention that your lawyer makes, that your case is a miscarriage of justice case. That is to say, that if I were to enforce the appellate and collateral review waiver it would result in a miscarriage of justice.

[226] The First Circuit has explained that that miscarriage of justice exception cannot be interpreted so broadly as to encompass every claim in which there is some kind of underlying constitutional or other error during the course of trial and pretrial proceedings. If that were the case, the miscarriage of justice exception would swallow the rule and appellate waivers would be invalidated in every case. So it has to be something other than a mere claim of error in the underlying proceeding.

In my view it is important, but not dispositive, to consider when you make a claim of ineffective assistance of counsel, and in particular a claim that the lawyer was operating under a conflict of interest, it is important to ask whether the conflict could have affected the advice that counsel gave with respect to the appellate and collateral review waiver. In my view, if there's a serious contention that a conflict could have affected the advice that was given to enter

into the waiver, it would in most circumstances be a miscarriage of justice to enforce the waiver under those circumstances because the defendant would be denied the benefit of counsel with respect to that very issue.

I don't find that to be the case here. I

* * *

[228] would produce a miscarriage of justice.

In your case I am unpersuaded by your lawyer's argument that there is the kind of actual conflict which could amount to an ineffective assistance of counsel. In reaching this conclusion I'm not endorsing Mr. Rehnquist's conduct. I'm not making any finding with respect to whether it was permissible or wise to simultaneously represent you and Mr. Harding. What I'm asking myself is whether you should be allowed to be relieved from the effect of your appellate and collateral review waiver. And that requires an actual conflict in this case. And the appropriate standard has again been provided by the First Circuit, I've quoted it many times and I'll do so one more time here. It is a standard developed by the court in United States against Rameriz-Benitez, which is reported at 292 F.3d 22, on page 29, a 2002 First Circuit opinion. That standard is whether the defendant's lawyer, quoting now, may plausibly have pursued an alternative defense strategy and that alternative strategy was in conflict with or may not have been pursued because of the lawyer's other loyalties or duties, end quote.

Here we don't have an argument that an alternative strategy should have been pursued. At various times you called it the evil company strategy or [229] the restatement strategy, but I don't think that it's a total failure of strategy because there is no evil company or restatement defense that could be made here. Rather, those matters are subsumed within a defense that was offered at trial, which is a defense that you lacked the kind of culpable knowledge to make you guilty of the crimes charged.

So I think the real issues here, not that there was a failure to put on a defense or to offer an alternative defense strategy, rather the issue is did the defendant's [sic] fail to produce certain evidence that would have further supported your lack of knowledge strategy. And in particular here I see your lawyers having focused on several things. Most importantly he contends that you should have been given the opportunity to testify, to explain the evil company or restatement strategy, at least what you knew of it based on your personal knowledge, and that certain exhibits should have been introduced into evidence, including the restatement itself that Mr. Rehnquist actually sought to preclude from trial, as well as certain other exhibits that might have further supported your argument that the company has a long established practice of activities which the government is contending in your case are illegal.

[230] The argument that your lawyer offers, as I understand it, as to why Mr. Rehnquist was inhibited or potentially inhibited from offering the evil

company defense in the way you wanted it to be offered, is that to present that defense would inevitably put him in conflict with the duty of loyalty his firm owed to Mr. Harding. Here's where I find the failure of your evidence to be. It's the reason why I feel you cannot be entitled to the relief that you seek here.

I've listened carefully to the evidence and to the arguments that your lawyer has presented. In my judgment you simply have failed to sufficiently demonstrate that there is anything that Mr. Rehnquist failed to do that he could have done that would have plausibly advanced your lack of knowledge defense that he failed to do because of a conflict in loyalty that was owed to Mr. Harding. As I've explained, I don't think you had any knowledge about Mr. Harding that you could testify to that would in any way have been damaging to Mr. Harding's interest. I don't think you knew enough about transactions at the company that you could have testified to based on personal knowledge. I don't think that you could have offered anything that would have even gotten us close to being a situation in which Mr. Rehnquist might be in conflict with the duty [231] he owed to you and the duty his firm owed to Mr. Harding. I don't think that there's anything that would have resulted that would have been damaging to Mr. Harding had the restatement been introduced that you now suggest that should have been introduced. And I don't think the other exhibits that you sought to offer, as far as I can tell at the present time, would even have been

admitted in the case. I think it seems to me to be irrelevant. But to the extent it was relevant, it wouldn't have been damaging to Mr. Harding. And so I simply am not persuaded that you have demonstrated that there was anything that was not done that plausibly could have been done had there not been a dual representation of you and Mr. Harding by Mr. Rehnquist's firm.

I also want to note as I said during the proceedings, Mr. Rehnquist had very good reasons to do what he did. Indeed I can't dispute his decision, in fact agree with him completely, his decision to recommend that you not testify. It is absolutely a correct decision that is defensible without regard to anything Mr. Harding has to say. His decision not to pursue the restatement and offer into evidence is an entirely defensible decision.

The strategy that you were pursuing at trial, [232] which is the only strategy I think that had any prospect for success, is the strategy that principally relied on the contentions that the accounting treatment of these matters was murky, that they were potentially entirely appropriate, and that in any event you lacked sufficient knowledge to be criminally culpable because of your late entry into the game, because of your very busy schedule, because you were distracted and uninvolved. And I think that to have you testify would have substantially undermined that defense, would have required a complete reorientation in defense strategy, and I don't see how it would

have been any prospect for success under the circumstances.

So I think there was – there were good reasons for Mr. Rehnquist to do what he did. I don't think there's any evidence in the record that is persuasive to me that supports the idea that Mr. Rehnquist failed to act or even plausibly could have failed to act because of the conflict of interest resulting from simultaneous representation.

Accordingly you haven't demonstrated that there's an actual conflict of interest, and as a result the enforcement of the appellate waiver would not result in an actual miscarriage of justice, and therefore there's no reason not to enforce the appellate waiver [233] and collateral review waiver. Because the appellate and collateral review waiver is enforceable, you're not entitled to proceed with your Section 2255 motion, and therefore the motion should be denied.

Does anybody want me to make any additional findings of fact or rulings of law that bear on this matter?

MS. OLLILA: Not from the United States, thank you.

THE COURT: Anything else? Your objections are preserved, counsel, to the extent you've raised them with me either in your brief or here during the course of these proceedings.

Is there anything else you need me to address?

MS. OLLILA: Not at this time, your Honor.

THE COURT: All right, thank you. Anything else?

MS. OLLILA: Nothing further. (Adjourned at 3:55 p.m.)

APPENDIX C

**NO COPY OF THIS TRANSCRIPT
MAY BE MADE PRIOR TO 10/28/09

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * * * * * * * * * *

ROBERT J. GAGALIS

v.

UNITED STATES OF AMERICA

08-cv-269-PB
July 20, 2009
9:40 a.m.

* * * * * * * * * * * * *

Day 1
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE PAUL J.
BARBADORO

Appearances:

For the Plaintiff: Terry Ollila, AUSA
U.S. Attorney's Office
53 Pleasant Street
Concord, NH 03301

For the Defendant: Michael H. Artan, Esq.
Michael H. Artan, Lawyer APC
One Wilshire Boulevard
Suite 2200
Los Angeles, CA 90017

Stephen M. Rasche, Esq.
Stephen M. Rasche PLLC
One New Hampshire Avenue
Suite 320
Portsmouth, NH 03801

Court Reporter: Sandra L. Bailey, LCR, CM, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

* * *

[44] THE COURT: Is there any policy that requires someone to consult with that individual when there is a potential conflict of interest about representation?

THE WITNESS: There's no – it's essentially a matter of the attorney's judgment. There's no requirements that when X, Y, Z factor presents itself you need to go to somebody.

Q. BY MR. ARTAN: Okay, now if I'm understanding the gist of what we've read so far, you and Mr. Apfel determined that a Chinese Wall should be utilized, but you did not tell Mr. Gagalis about it; correct?

A. That's what I take away from this e-mail, yes.

Q. And just to be clear, your firm was billing Mr. Gagalis's employer quite a bit of money for his representation; correct?

A. That's correct.

Q. In fact, the billings that were paid to your firm exceeded $4,000,000; correct?

A. I wouldn't dispute that.

Q. And would you agree with me that as a partner, you're counted on to bring in substantial billings every year?

A. Sure.

Q. And Mr. Apfel was a partner also; right?

A. Yes.

* * *

[86] myself.

Q. BY MR. ARTAN: Well, if Mr. Gagalis – Mr. Gagalis told you that he thought the deals were legal in large part because they had been going on so long and he was assured by people that the fact that they were going on historically was part of the reason he thought they were legal; isn't that correct?

A. That sounds correct.

Q. Okay. And so to that extent, putting on the history of these investment deals would have been a component of his defense; correct?

A. Well, and I think to some extent the history of the investment deals was a component of his defense. But finger pointing as to the misconduct that others may have committed in establishing and executing this history I did not think was a viable part of the defense, and we talked about this at length.

THE COURT: Counsel, I want to be clear. I'm not able to make the leap that you're asking me to make, so you better try to fill it some way.

MR. ARTAN: Well, I am –

THE COURT: Just let me finish, to be clear, so you understand my thinking.

It is a huge leap in my mind to say we will put on evidence that there were other three-corner deals

* * *

[124] involved situations where they purchased equipment and sometimes they were involved in investments where the company wouldn't buy equipment at all.

Do you see that?

A. Yes.

Q. Now, at some point someone in your firm, whether it's you or your associate or whomever, was aware that Mr. Harding, who was also represented by your firm, was in charge of investment deals in which Cabletron would invest in a company and the company in turn would buy product from them; correct?

A. That's what he said, and I assume there would be no reason to dispute that.

Q. Now, bearing in mind Mr. Gagalis's requests that we put in the history, investment history of Enterasys and Cabletron, having learned about Mr. Harding's role as the person in charge of those

investments, did you tell Mr. Gagalis at any point that that could pose a conflict of interest?

A. I don't recall discussing that specific issue with him.

Q. And I'd like to point out, direct you, actually, to page 55 now.

Is that clear for your Honor?

THE COURT: Yup.

[125] Q. Line 17 through 24. Are you aware of any investment transactions in which Cabletron wouldn't have made the investment but for the other company's agreement to purchase its product? Answer: In some investments you would – in some investments when you do the minority investment, you would not do the minority investment if the company didn't purchase your equipment, Cabletron equipment. So yes, that did occur.

Now, that was the – one of the elements of the three-corner deals that came before this court in Mr. Gagalis's case; right?

A. I don't understand the question.

Q. Circumstances in which the deals were characterized as being basically a deal that was really for the purpose of having Enterasys sell its product and boost its revenue and not really the primary basis being investment?

A. That was one of the government's positions. Certainly that was the government's position with respect to some transactions, and I'm not sure that — I think the evidence was not necessarily the same with respect to the different types of these transactions.

Q. Now, I mean, as you sit here today, you have some doubt in your mind about the illegality of any of those deals that were in your trial; right?

[126] A. I'm sorry?

Q. As you sit here today, looking back on the trial, you doubt the illegality of the deals that were at issue?

A. I doubt the illegality?

Q. In other words, I'm sorry about the double negative, but the government was claiming that they were illegal; right?

A. The minority investment deals? Yes, the government was contending they were illegal.

Q. All right. And as you sit here today, you think it was legal, don't you?

A. I thought we had a good faith basis for defending the case on that theory. I thought there was certainly ambiguity about the accounting, and we defended the case on that theory. And the jury reached the conclusion that they did.

THE COURT: When we talk about legality or illegality of the deals, I assume you're making a shorthand reference that was to his concerns the accounting for the deals which when you publically report them generating revenue that's recognizable, you are in fact making a misrepresentation, and that's what you're really saying, right, counsel?

MR. ARTAN: I am. It's just that Mr. [127] Rehnquist had made a side comment –

THE COURT: Just to be clear. Illegal or legal, there's nothing illegal about doing it. It's about how you account for it and what representations you make to the public about the revenue-generating effects of the deals. That is the source of the illegality.

MS. OLLILA: And it's also the disclosure to the accountant, whether or not you make the necessary disclosure.

MR. ARTAN: Yes, your Honor, I was using a shorthand.

THE COURT: Okay.

THE WITNESS: And just so it's clear, I understood his shorthand to mean that these transactions would have been illegal to the extent revenue was booked on them and published and recorded.

Q. BY MR. ARTAN: And on page 63 Mr. Harding is acknowledging that aside from himself, David Kirkpatrick, Piyush Patel and sometimes Jack

Huffard would negotiate and approve the minority investments.

Do you see that at lines 16 through 20?

A. I do see line 16 through 20 and I see what they said.

Q. Okay. And this was all information that was

* * *

[131] Q. Yes.

A. Yeah, I do see that.

Q. And again, that was available to your firm prior to trial; right?

A. We had the transcript, yes.

Q. And are you also aware that Riverstone was doing three-party deals, or in other words, three-corner deals under Mr. Harding?

A. Yeah, I'm assuming I was aware of that.

Q. Okay. Just for good orders sake, page 119.

A. I'm sorry, by three-corner deals are you – why don't you tell me. If you're going to ask me about three-corner deals, why don't you tell me what you mean by that.

Q. Let me just cite to the record and we can do it more simply. Okay? Page 119, lines 15 through 24. He was asked, in other words, are you aware of any Riverstone investment deals where the product was

sold through a reseller to the investee company rather than directly from Riverstone. Answer: Yes, there were some. Outside the United States we sell only through resellers, so we don't sell direct. So if we would make an investment in a company outside the United States, the sale would be through a reseller. The sale of the equipment would be through a reseller in the company we [132] invested in.

Do you see that?

A. I see it.

Q. Now, you read, ultimately read the Wells Submission that was submitted on behalf of Mr. Harding; correct?

A. I am confident that either I read it or someone on my team read it. I probably read it. It would probably be indicated in my time records that you have if I read it myself.

Q. That was part of the Brady and Giglio material that came to the defense before trial; correct?

A. I don't know if it was expressly described as Brady and Giglio period, but I believe we received it.

Q. And do you remember anything about the Wells Submission?

A. I remember that I believe it ultimately proved to be successful, and my memory is that the SEC did not bring any charges against Mr. Harding.

Q. And the subject of, one of the subjects of the SEC's interest in Mr. Harding was a Megaworld deal; correct?

A. I don't recall.

Q. And page 163 he's asked, did Cabletron invest in Megaworld in order to meet its revenue targets. He

* * *

[134] without reading it, you know, more closely and reading the whole section.

Q. Now, to the extent that you were aware of what Harding was saying at his deposition, did you ever say to Mr. Gagalis, hey, you know, Harding is up to his eyeballs in investment deals. If we do a defense that talks about the investment history of Cabletron, it's going to implicate him. Did you ever have such a discussion with Mr. Gagalis?

A. I don't recall discussing that precisely with him specifically.

Q. Now, Mr. Harding was in fact part of the senior management at Cabletron to the point where he was in a specially key-coded area that was shared only with Piyush Patel, David Kirkpatrick and Eric Jaeger; is that correct?

A. I don't recall.

Q. Now, you were given a number of FBI 302s in relation to this, the preparation of your defense of Mr. Gagalis at trial; correct?

A. Oh yes, yes.

Q. And one of them was Gerald Haines' 302 which is Exhibit 14 in binder number two, sir, and you see it up on the screen. Mr. Haines was general counsel at Cabletron. Stated that Eric Jaeger and the rest of the [135] senior executives were on the second floor, behind the glass wall. That was a secure area that was key-coded. Piyush Patel, David Kirkpatrick, Eric Jaeger and Dan Harding, along with two secretaries, were behind the glass wall.

Now that's a 302 that you had access to before trial; right?

A. I presume so.

Q. Okay. So when you read that, did it trigger off concern in your mind that to go into the history of Cabletron would somehow implicate Dan Harding, a client of your firm?

A. No, it did not, because as I've explained, you know, any defense that was based on implicating former Cabletron people in a pejorative way was, I thought, an untenable defense, so it did not trigger anything you said.

Q. Okay, but just by – let me try and ask a more specific question.

If you were to put on a defense stating that similar investment deals had been going on under the auspices of Dan Harding, regardless of how they are characterized, whether they are characterized as legal or illegal, just the fact that they're similar, would that be something that David Apfel could do?

* * *

APPENDIX D

**NO COPY OF THIS TRANSCRIPT
MAY BE MADE PRIOR TO 10/28/09

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

* * * * * * * * * * * * *

ROBERT J. GAGALIS

v.

UNITED STATES OF AMERICA

08-cv-269-PB
July 21, 2009
9:10 a.m.

* * * * * * * * * * * * *

Day 2
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE PAUL J.
BARBADORO

Appearances:

For the Plaintiff: Terry Ollila, AUSA
U.S. Attorney's Office
53 Pleasant Street
Concord, NH 03301

For the Defendant: Michael H. Artan, Esq.
Michael H. Artan, Lawyer APC
One Wilshire Boulevard
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Los Angeles, CA 90017

Stephen M. Rasche, Esq.
Stephen M. Rasche PLLC
One New Hampshire Avenue
Suite 320
Portsmouth, NH 03801

Court Reporter: Sandra L. Bailey, LCR, CM, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

* * *

[220] MR. ARTAN: And what you identified was the bad evidence coming in against Harding but not Gagalis.

THE COURT: Right, two separate trials. Rehnquist went all out for Mr. Gagalis, did everything he possibly could, and brought in everything bad that could possibly come in against Harding, but in Harding's trial Mr. Rehnquist went into the tank and protected Mr. Gagalis. Both get convicted. The exact same thing happens in Mr. Gagalis's case that's happened. He was faced with a high sentence. He executed an appellate waiver. He comes in and says in a 2255 ineffective assistance of counsel, actual conflict, I'm entitled to have my appellate waiver set aside because there was a conflict. You demonstrate to me very persuasively that the highest provisions of the bar are that you can't simultaneously represent two individuals. Does that give Mr. Gagalis the win?

MR. ARTAN: No.

THE COURT: What is missing?

MR. ARTAN: What's missing is the way you characterized Mr. Gagalis's trial because we have

elements in Mr. Gagalis's trial that were omitted that I think tend to incriminate Mr. Harding.

THE COURT: That's exactly what I'm telling you you need to focus on. You see, you keep coming back [221] to highest traditions of the bar, and I'm saying to you and my example demonstrates for you, that merely showing to me that there shouldn't have been simultaneous representation doesn't get you the win. I'm saying let's get beyond that issue and focus on what they would have done differently in Gagalis's trial. That's what the standard is that you drew to my attention.

MR. ARTAN: The restatements, Final Mile, discussions about Jaeger, all those things tend to incriminate Harding.

THE COURT: That's, okay, and that's I think, that is the point where I think it's a legitimate disagreement that we have. All this other stuff is side show. This is what the whole thing boils down to. As I said on the very first day is, I think you need to have evidence that was not put on that plausibly could have been withheld because of the existence of a conflict. Your view of that is anything, any kind of evidence that might have been put on that in any way, shape or form might have somehow eventually in some future proceeding led to something that could be damaging to Harding, is sufficient to satisfy that standard, and I think something more than that is required. And I think that's one of the areas in which we disagree and I think it's the central issue that I've been trying to get at [222] for several days. Now, I

acknowledge I could be wrong about that. It's possible. But I think that's where the focus needs to be. And you've articulated your view on that point I think quite well. It is any evidence about deals before Gagalis came there could potentially lead to further investigation that might uncover something bad about Harding and therefore Rehnquist, because his firm was representing Harding, had a duty to stay away from that and he couldn't simultaneously offer that evidence and stay away from that. I look at that evidence and say, I couldn't find anything that is sufficiently tied to Harding that could potentially lead to anything that could be damaging to say that it is even plausible that the evidence was avoided for that reason. Instead I think there were very sound reasons why that evidence was not admitted and that have nothing to do with the conflict. So I think under those circumstances you don't satisfy that element of the test, and that's I think where we disagree.

MR. ARTAN: Well, judges have disagreed with me before, your Honor, I'm sorry to say.

THE COURT: But as long as we're talking on the same page –

MR. ARTAN: That's the same page, your Honor.

THE COURT: All right, is there anything else

* * *

APPENDIX E

U.S. Department of Justice

[SEAL] *United States Attorney*
District of New Hampshire

Federal Building *603/225-1552*
55 Pleasant Street, Room 312
Concord, New Hampshire 03301

January 25, 2005

James C. Rehnquist, Esquire
Goodwin Procter L.L.P.
Exchange Place
Boston, Massachusetts 02019

Re: United States v. Robert J. Gagalis and Bruce D. Kay

Dear Attorney Rehnquist:

I am writing to advise you that it has come to my attention that an actual, or at least a serious potential, conflict of interest has arisen in connection with your representation of Robert J. Gagalis. The conflict issue arises from your firm's joint representation of Mr. Gagalis and Daniel Harding in the government's on-going investigation and pending criminal prosecution of Mr. Gagalis and others with regard to an accounting fraud at Enterasys Network Systems, Inc. I have come to learn that Mr. Harding is represented in those matters by your partners, David Apfel and Todd Cronan.

Please be advised that the interests of Mr. Harding in the government's investigation and prosecution

may diverge significantly from the interests of Mr. Gagalis. For example, your firm's duty of loyalty would be seriously divided if your partners were called upon to advise Mr. Harding about whether to accept any offer of leniency or immunity in exchange for his cooperation where the decision to accept any such offer could adversely impact Mr. Gagalis (directly or indirectly), but a decision to reject any such offer could damage the interests of Mr. Harding. In addition, your firm's joint representation creates the possibility of significantly impairing your ability to cross-examine Mr. Harding in the event he some day testifies against Mr. Gagalis. Your firm's joint representation of Mr. Harding and Mr. Gagalis also creates the potential for a collateral attack to any conviction of either client on the grounds of ineffective assistance of counsel.

Your firm's joint representation implicates a number of provisions of the New Hampshire Rules of Professional Conduct, which have been adopted as the standards for professional conduct by the United States District Court for the District of New Hampshire. *See* Rule 83.5 (Civil) and 1.1(d) (Criminal) of the Local Rules. In addition to Rules 1.7 (Conflict of Interest; General Rule) and 1.10 (Imputed Disqualification; General Rule), your firm's joint representation of Mr. Gagalis and Mr. Harding also may implicate other ethical standards including Rules 1.3 (Diligence) and 1.6 (Confidentiality of Information). Also, your firm's joint representation of Mr. Gagalis and Mr. Harding threatens the integrity of the impending

trial of Mr. Gagalis and could seriously impede the effectiveness of the on-going grand jury investigation.

Accordingly, by this letter, I am asking your firm to eliminate the actual or potential conflict of interest by withdrawing from its representation of either Mr. Harding or Mr. Gagalis or both. In the event, you and your partners do not agree to terminate the joint representation of Mr. Gagalis and Mr. Harding, a judicial hearing into the potential conflict of interest would be necessary to address the issues discussed herein and make an appropriate record before the prosecution and investigation proceed much further.

Please advise me of your intentions with regard to this matter at your earliest convenience

Sincerely yours,

PETER E. PAPPS
Acting United
States Attorney

By: /s/ Will E. Morse
William E. Morse
Assistant U.S. Attorney

cc: Cathy J. Green, Esquire

Gilliatt, Nancy B

From: Robert Gagalis [rgagalis@comcast.net]
Sent: Tuesday, January 25, 2005 2:09 PM
To: Rehnquist, James C
Cc: cathy@green-utter.com; Luz, Kathleen; Hemani, Abigail
Subject: RE: Morse Comment

Jim, Thanks for the heads up on this. Since your partner is willing to withdraw if a conflict, I do not see any issue. I have a couple of calls now, but will give you a call later today. Another sign of weakness on Morse's part from my perspective. Bob

- - - - - - - - - - - - - - - - - -

Robert J. Gagalis
P.O. Box 381
Rye, NH 03870
603-964-5616
603-396-3817 (cell)
rgagalis@comcast.net

- - - - - Original Message - - - - -
From: Rehnquist, James C [maito:JRehnquist@goodwinprocter.com]
Sent: Tuesday, January 25, 2005 11:51 AM
To: rgagalis@comcast.net
Cc: cathy@green-utter.com; Luz, Kathleen; Hemani, Abigail
Subject: Morse Comment

Bob:

I do not believe this will amount to a problem, but I did want to share with you a recent comment from Morse.

The background is that one of my partners, David Apfel, represents former Riverstone exec Dan Harding in connection with the government's investigation of Riverstone, which is ostensibly an entirely separate investigation from the investigation that lead to your indictment, and which is still underway. The SEC has opened a file with a separate SEC file name (Riverstone, not Enterasys) for the investigation, and the SEC is coordinating not with Morse but rather with the U.S. Attorney in San Francisco. I learned of this representation several weeks after we began representing you, and both David and I agreed that there was no conflict of interest or, indeed, much potential for a conflict of interest, given the separateness of the investigations and the fact that you and Harding didn't even overlap in your tenure as employees. Nonetheless, out of an abundance of caution, we put up a "Chinese Wall" within the firm, so no one working on the Harding matter has any substantive communication with anyone on your team. I made the decision not to discuss this with you at the time, given the small likelihood of the issue surfacing.

In any event, the issue has surfaced, in a mild way. Morse (for reasons David and I have not discussed) called Apfel out of the blue a week or so ago, and in the resulting conversation, which took place last Friday, expressed "concern" when he learned that David was also at Goodwin. He has indicated that he may communicate his concerns in a letter to one or both of us. He may really have concerns, or this may have just been a knee-jerk reaction to hearing the name of the firm.

Although an actual conflict – say, if Harding were to end up as a government witness in your trial – is extremely unlikely (and could probably be overcome by waivers from both you and Harding in any event) Morse may attempt to create one. Alternatively, if he brings something to our attention which indeed suggests a potential conflict, and is not waivable, David has agreed that he will withdraw from representing Harding. Although it is unlikely, Morse could even attempt to disqualify me as counsel – the sincerest form of flattery – although such motions are frowned upon by judges and this one would surely be a loser. In any case, I am confident that this issue will not have any adverse effect on my representation of you.

I am sorry you have to spend any time at all thinking about this, but I did want to give you a heads-up. Please call to discuss.

Jim

****

This message is intended only for the designated recipient(s). It may contain confidential or proprietary information and may be subject to the attorney-client privilege or other confidentiality protections. If you are not a designated recipient, you may not review, copy or distribute this message. If you receive this in error, please notify the sender by reply e-mail and delete this message. Thank you.

****

Gilliatt, Nancy B

From: Robert Gagalis [rgagalis@comcast.net]

Sent: Tuesday, January 25, 2005 3:26 PM

To: Rehnquist, James C

Cc: cathy@green-utter.com; Luz, Kathleen; Hemani, Abigail

Subject: RE: Morse Comment

I seem to recall that Harding may have had some role in the investment deals prior to my joining ETS – He may have even reported to Patel or Jaegar. If Patel, Kirpatrick and Jaegar are indicted, could be a stronger possibility that Harding could end up testifying at my trial.

- - - - - - - - - - - - - - - - - - -

Robert J. Gagalis
P.O. Box 381
Rye, NH 03870
603-964-5616
603-396-3817 (cell)
rgagalis@comcast.net

- - - - - Original Message - - - - -

From: Rehnquist, James C [maito:JRehnquist@goodwinprocter.com]

Sent: Tuesday, January 25, 2005 11:51 AM

To: rgagalis@comcast.net

Cc: cathy@green-utter.com; Luz, Kathleen; Hemani, Abigail

Subject: Morse Comment

Bob:

I do not believe this will amount to a problem, but I did want to share with you a recent comment from Morse.

The background is that one of my partners, David Apfel, represents former Riverstone exec Dan Harding in connection with the government's investigation of Riverstone, which is ostensibly an entirely separate investigation from the investigation that lead to your indictment, and which is still underway. The SEC has opened a file with a separate SEC file name (Riverstone, not Enterasys) for the investigation, and the SEC is coordinating not with Morse but rather with the U.S. Attorney in San Francisco. I learned of this representation several weeks after we began representing you, and both David and I agreed that there was no conflict of interest or, indeed, much potential for a conflict of interest, given the separateness of the investigations and the fact that you and Harding didn't even overlap in your tenure as employees. Nonetheless, out of an abundance of caution, we put up a "Chinese Wall" within the firm, so no one working on the Harding matter has any substantive communication with anyone on your team. I made the decision not to discuss this with you at the time, given the small likelihood of the issue surfacing.

In any event, the issue has surfaced, in a mild way. Morse (for reasons David and I have not discussed) called Apfel out of the blue a week or so ago, and in the resulting conversation, which took place last Friday, expressed "concern" when he learned that David was also at Goodwin. He has indicated that he may communicate his concerns in a letter to one or both of us. He may really have concerns, or this may have just been a knee-jerk reaction to hearing the name of the firm.

Although an actual conflict – say, if Harding were to end up as a government witness in your trial – is extremely unlikely (and could probably be overcome by waivers from both you and Harding in any event) Morse may attempt to create one. Alternatively, if he brings something to our attention which indeed suggests a potential conflict, and is not waivable, David has agreed that he will withdraw from representing Harding. Although it is unlikely, Morse could even attempt to disqualify me as counsel – the sincerest form of flattery – although such motions are frowned upon by judges and t[illegible]one would surely be a loser. In any case, I am confident that this issue will not have any adverse effect on my representation of you.

I am sorry you have to spend any time at all thinking about this, but I did want to give you a heads-up. Please call to discuss.

Jim

****

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****

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Boston, MA 02109
T: 617.570.1000
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January 26, 2005

By Facsimile

Mr. Robert J. Gagalis
152 Harbor Road
P.O. Box 381
Rye, NH 03870

Cathy J. Green
Green & Utter, P.A.
764 Chestnut Street
Manchester, NH 03104-3012

Dear Cathy and Bob:

Enclosed please find a letter from Morse regarding the alleged conflict issue. I am preparing a response, which I will send you in draft form for your review and comment. (All work done resolving this will be on the firm's nickel, and will not be billed to you or ETS.)

Sincerely yours,

/s/ James C. Rehnquist
James C. Rehnquist

JCR/ng
Enclosure

Gilliatt, Nancy B

From: Rehnquist, James C
Sent: Tuesday, February 01, 2005 1:25 PM
To: 'rgagalis@comcast.net'
Cc: 'cathy@green-utter.com'; Luz, Kathleen; Hemani, Abigail
Subject: RE: Morse Conflict Issue

The plan is that Harding will retain new counsel to advise him in his dealings with Morse and the USAO-NH. This should address both of Morse's concerns. My partners are still discussing with Harding but do not anticipate any problems.

I spoke to Cathy about forcing Morse's hand by filing a discovery motion, and she agrees with the strategy – we should have a letter (which must precede a motion) ready to go shortly.

- - - - - Original Message - - - - -
From: Robert Gagalis <rgagalis@comcat.net>
To: Rehnquist, James C
<JRehnquist@goodwinprocter.com>
Sent: Tue Feb 01 12:39:47 2005
Subject: Morse Conflict Issue

Jim, any update on conflict issue? Bob

- -

Robert J. Gagalis
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February 8, 2005

By Facsimile and Regular Mail

William E. Morse, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
Federal Building
55 Pleasant Street, Rm. 312
Concord, NH 03301-0001

Re: United States v. Robert Gagalis, et al.

Dear Mr. Morse:

I write in response to your letter dated January 25, 2005, in which you make reference to alleged actual or potential conflicts of interest arising out of my representation of Bob Gagalis in the above-referenced matter and my partners' representation of Dan Harding in connection with other matters.

While I certainly do not concede the existence of any actual or potential conflict, I write to inform you of certain measures taken to allay the two concerns articulated in your letter.

First, as I believe you have been advised, lawyers from my firm will not be representing Mr. Harding in

connection with his dealings with your office. I do not know any of the details of this arrangement, but I expect that it would allay the concern expressed in your letter about the advice Mr. Harding might receive if he were to receive any offer of leniency or immunity in exchange for his cooperation in your case.

Second, in response to your expressed concern about my ability to zealously cross-examine Mr. Harding in the event he should become a witness in your case, we have decided that my co-counsel, Cathy Green, will conduct any such cross-examination.

I should hope that these measures will allay your concerns. Please advise me at your early convenience if you have any questions or comments.

Very truly yours,

/s/ James C. Rehnquist
James C. Rehnquist

JCR/ng

cc: Robert J. Gagalis *(by facsimile and regular mail)*
Cathy Green, Esq. *(by facsimile and regular mail)*

U.S. Department of Justice

[SEAL] *United States Attorney*
District of New Hampshire

Federal Building *603/225-1552*
55 Pleasant Street, Room 312
Concord, New Hampshire 03301

February 17, 2005

ADVANCE COPY BY FAX

James C. Rehnquist, Esquire
Goodwin Procter L.L.P.
Exchange Place
Boston, Massachusetts 02019

Re: United States v. Robert J. Gagalis and Bruce D. Kay

Dear Attorney Rehnquist:

I am writing again about the conflict of interest issues arising from your firm's dual representation of Robert J. Gagalis and Daniel Harding, which I described in some detail in my letter of January 25, 2005.

Please be advised that, when I stated in our telephone conversation earlier this week that I no longer believed it was necessary to seek judicial intervention to address the conflict issues, I thought that your firm had withdrawn from representing Mr. Harding in any government investigation of accounting fraud at Enterasys and related companies. Although one of your partners alluded to another matter in which your firm represented Mr. Harding, I did not understand your

firm to represent Mr. Harding in any other matters in which it might be called upon to counsel him with regard to cooperating in a way that could affect Mr. Gagalis.

Through additional conversations with your partner, David Apfel, and others, I have since learned that, in fact, your firm continues to represent Mr. Harding in other government investigations which may result in criminal charges. Based upon this new information, I now believe that a serious actual or potential conflict of interest requiring judicial intervention continues to exist. Among other things, your firm's loyalties would be seriously divided if you continued to represent two clients in (even separate) criminal matters, where one or both clients is, or might be, in a position to obtain leniency by providing information that could directly or indirectly inculpate the other.

It is the government's view that a judicial hearing will be necessary to vet the conflict issues in the event your firm does not withdraw completely from its representation of either Mr. Harding or Mr. Gagalis.

Please advise me of your firm's intentions with regard to this matter by February 25, 2005.

Sincerely yours,

PETER E. PAPPS
Acting United
States Attorney

By: /s/ Will E. Morse
William E. Morse
Assistant U.S. Attorney

cc: Cathy J. Green, Esquire

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February 25, 2005

By Facsimile and Regular Mail

William E. Morse, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
Federal Building
55 Pleasant Street, Rm. 312
Concord, NH 03301-0001

Re: United States v. Robert Gagalis, et al.

Dear Mr. Morse:

I was greatly surprised by your letter of February 17, 2005, regarding your continued allegations regarding conflict of interest. As you know, my firm took substantial steps to allay the concerns you identified in your January 25 letter, even though we dispute the existence of any actual or potential conflict. And as you concede in your February 17 letter, we had spoken by phone just days earlier and you had stated that you did not intend to pursue your allegations any further.

You have now changed your position, purportedly because you had thought, at the time of our telephone

conversation, that my partners "had withdrawn from representing Mr. Harding in any government investigation of accounting fraud at Enterasys and related companies." I don't see how you could possibly have reached such a sweeping conclusion based on your communications with my firm.

Nor do I understand your basis for believing that Mr. Harding's separate representation in any dealings with your office does not cure any potential conflict you allege. I have no idea whatsoever whether your office or any other federal authority believes that Mr. Harding has any exposure in regard to any matters being investigated. But surely, even if Mr. Harding were now or later in a position to obtain leniency by cooperating against Mr. Gagalis your office – the beneficiary of any such cooperation – would be involved, and Mr. Harding would have separate representation.

You also appear to imply in your letter that an actual or potential conflict exists because Mr. Gagalis is or may be in a position to obtain leniency by cooperating against Mr. Harding. This possibility never mentioned in your original letter – strikes me as utterly fanciful.

In short, I am stunned that you have reversed course here. Please give me a call to discuss this matter at your early convenience.

Very truly yours,

/s/ James C. Rehnquist/ng
James C. Rehnquist

JCR/ng

cc: Robert J. Gagalis *(by facsimile)*
Cathy Green, Esq. *(by facsimile)*

U.S. Department of Justice

[SEAL] *United States Attorney*
District of New Hampshire

Federal Building *603/225-1552*
55 Pleasant Street, Room 312
Concord, New Hampshire 03301

March 1, 2005

ADVANCE COPY BY FAX

James C. Rehnquist, Esquire
Goodwin Procter L.L.P.
Exchange Place
Boston, Massachusetts 02019

Re: United States v. Robert J. Gagalis and Bruce D. Kay

Dear Attorney Rehnquist:

I am writing in response to your fax of Friday, February 25.

First, I will reiterate that the government objects to your firm representing both Mr. Harding and Mr. Gagalis. As I have stated on several previous occasions, your firm's dual representation of those two clients creates a situation where the firm's loyalties are seriously divided. By representing both clients, the firm is put in the untenable position of advising one or both clients on the issue of whether to seek immunity or leniency by providing information that could directly or indirectly incriminate the other client.

With respect to your characterization of any government concern about Mr. Gagalis cooperating against Mr. Harding as "fanciful," please note that the government fully understands that Mr. Gagalis is intent on having his day in court. The government has never suggested that there was any likelihood that Mr. Gagalis would actually cooperate against Mr. Harding. Mr. Gagalis' *potential* cooperation is significant mainly because, if convicted at trial, Mr. Gagalis could claim that he did not receive the benefit of your firm's unbiased advice concerning the respective benefits and risks of cooperating versus contesting the Grand Jury's indictment. For the reasons stated above, such a claim could not be dismissed as entirely without merit.

Finally, I will take this opportunity to address your claim that, "based on [the government's] communications with your firm," you do not see how I could have misconstrued the scope of your firm's withdrawal with respect to Mr. Harding. Your partners who represent Mr. Harding have informed me that "there has been a strictly-observed Chinese Wall between" you and them (an arrangement which, as an aside, raises its own concerns with respect to your firm's ability to provide effective assistance.) In light of that so-called "Chinese Wall," I presume that your partners' conversations and correspondence with the government on this issue were not shared with you, and I therefore respectfully submit that you could not know what your partners have communicated to the government about the scope of their withdrawal.

It seems as if we have reached an impasse on this issue, but, if you wish to discuss it further, please do not hesitate to contact me. Unless and until I hear from you, the government will operate on the premise that your firm willing not take any further steps to alleviate the conflict issues.

Thank you for your attention to this matter.

Sincerely yours,

PETER E. PAPPS
Acting United
States Attorney

By: /s/ Will E. Morse
William E. Morse
Assistant U.S. Attorney

cc: Cathy J. Green, Esquire

APPENDIX F

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to secure legal advice about the lawyer's compliance with these Rules; or

(3) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct

in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

Rule 1.7. Conflicts of Interest

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client

represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Ethics Committee Comment

The requirements that a lawyer maintain loyalty to a client and protect the client's confidences are fundamental. Although both the former rule 1.7 and the current rule 1.7(b) allow a lawyer to undertake representation in circumstances when there is [sic] exists a concurrent conflict of interest, the lawyer should use extreme caution in deciding to undertake such representation. The lawyer must make an independent judgment that he or she can provide "competent and diligent representation" before the lawyer can even ask for consent to proceed. The court in subsequent proceedings can review such a judgment. *See Fiandaca v. Cunningham*, 827 F.2d. 825 (1st Cir. 1987).

In evaluating the appropriateness of representation in a conflict situation under 1.7(b), the New Hampshire Bar Association Ethics Committee has used under the old rules the "harsh reality test" which states:

"(i)f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether

there had been full disclosure to the client prior to obtaining the consent. If this "harsh reality test" may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation. . . ." New Hampshire Bar Association Ethics Committee Opinion 1988-89/24 (http://nhbar.org/pdfs/f088-89-24.pdf).

This test has proven useful to practicing attorneys and retains its validity under the amended rules.

As discussed in Comment 17 to the ABA Model Rules, the determination of whether two clients are directly aligned against one another so as to give rise to a non-waivable conflict will require case-by-case analysis in the context of the particular circumstances. Other factors – including the availability of insurance, hold harmless agreements or indemnification agreements – may also be relevant in determining whether the interests of the clients are in reality "directly adverse" so as to preclude waiver of, or consent to, the conflict. However, even when third party payers or other financial protections eliminate the clients' financial exposure in litigation, there are claims (for example, assertions of comparative fault among professionals) in which the client, not the insurer, may have a strong personal interest in a vigorous defense of their work despite the fact that insurance will cover any judgment. This makes such concurrent representation impossible. In making these determinations, the harsh reality test discussed above should be foremost in the attorney's mind.

Rule 1.10. Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

APPENDIX G

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-377 **October 16, 1993**
Positional Conflicts

When a lawyer is asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different and unrelated pending matter which is being litigated in the same jurisdiction, the lawyer, in the absence of consent by both clients after full disclosure, should refuse to accept the second representation if there is a substantial risk that the lawyer's advocacy on behalf of one client will create a legal precedent which is likely to materially undercut the legal position being urged on behalf of the other client. If the two matters are not being litigated in the same jurisdiction and there is no substantial risk that either representation will be adversely affect [sic] *by the other, the lawyer may proceed with both representations.*

The Committee has been asked to address the question whether a lawyer can represent a client with respect to a substantive legal issue when the lawyer knows that the client's position on that issue is directly contrary to the position being urged by the lawyer

(or the lawyer's firm) on behalf of another client in a different, and unrelated, pending matter.[1]

At the outset, it should be noted that the second paragraph of the Comment to Rule 1.9 of the Model Rules of Professional Conduct (1983, amended 1993) specifically states that

> a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.[2]

On the other hand, arguing a position on behalf of one client that is adverse to a position that the lawyer, or her firm, is arguing on behalf of another current client raises a number of concerns. For example, if both cases are being argued in the same court, will the impact of the lawyer's advocacy be diluted in

---

[1] For purposes of this Opinion, the Committee assumes that the issue on which conflicting positions are to be taken is one of substantive law. Although procedural, discovery and evidentiary issues could in some circumstances raise the same problem as is here addressed, such issues almost invariably turn on their particular facts, and it is therefore rare that such issues will give rise to the type of conflict problem that is the subject of this Opinion.

[2] The exceptions implied by the Comment's reference to a "type" of problem would include circumstances where the matter is the same as the one in which the lawyer represented the former client, or where confidences of the former client may be susceptible to misuse. See Model Rules 1.9(a) and 1.9(c)(1).

the eyes of the judge(s)? Will the first decision rendered be persuasive (or even binding) precedent with respect to the other case, thus impairing the lawyer's effectiveness – and, if so, can the lawyer (or firm) avoid favoring one client over the other in the "race" to be first? And will one or the other of the clients become concerned that the law firm it has employed may have divided loyalties?

What, then, should a lawyer do when confronted with such a "positional conflict"?

To answer this question, we must look to Model Rule 1.7, which states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients

> in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

These provisions are supplemented by a Comment that recognizes (but does not resolve) the issue addressed here:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.[3] (emphasis added)

The rationale of the last clause is not clear, but it may stem from the view that a ruling in one of the two appellate cases would in all likelihood constitute binding precedent with respect to the second case, under the doctrine of stare decisis, and it would therefore be highly unlikely that the lawyer would be able to win both cases. Conversely, if there is a

---

[3] The Comment also states that "loyalty to a client" is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

likelihood that the lawyer can win both cases – as, for example, where the two cases are "pending in different trial courts" or before different trial judges in the same judicial district – there is no ethical reason why the lawyer should not proceed.

Whether this be the rationale or not, the Committee does not believe that a distinction should be drawn between appellate and trial courts in this regard. After all, the impact of an appellate court decision on the second case would be the same even if the second case were still before the trial court in that particular jurisdiction. Moreover, even if both cases were in the trial court, but assigned to different judges, the decision in the first-decided case would, in all likelihood, carry at least some precedential or persuasive weight in the second case. And if both cases should happen to end up before the same judge, the situation would be even worse. For although judges well understand that lawyers, at various stages of their careers, can find themselves arguing different sides of the same issue, the persuasiveness and credibility of the lawyer's arguments in at least one of the two pending matters would quite possibly be lessened, consciously or subconsciously, in the mind of the judge.

The Committee is therefore of the opinion that if the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create a legal precedent, even if not binding, which is likely materially to undercut the legal position being urged

on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.[4]

If, on the other hand, the two matters will not be litigated in the same jurisdiction, the lawyer should nevertheless attempt to determine fairly and objectively whether the effectiveness of her representation of either client will be materially limited by the lawyer's (or her firm's) representation of the other. In addressing that key issue, the lawyer may usefully consider the following questions:

(a) Is the issue one of such importance that its determination is likely to affect the ultimate outcome of at least one of the cases?

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[4] Where there is such a conflict between separate representations, in the Committee's view the provision of Rule 1.7 that is potentially applicable is not paragraph (a), but paragraph (b). The former, in referring to a representation that is "directly adverse" to another client, contemplates litigating, or maintaining a position, in a given matter, on behalf of one client against a person or entity which is a client of the lawyer (or her firm) in another matter. The test under paragraph (b), on the other hand, is whether the representation of a client in one matter may be "materially limited" by the lawyer's responsibilities to another client in another matter, and the Committee views the impairment of a representation as a material limitation within the meaning of that paragraph.

(b) Is the determination of the issue in one case likely to have a significant impact on the determination of that issue in the other case? (For example, does the issue involve a new or evolving area of the law, where the first case decided may be regarded as persuasive authority by other courts, regardless of their geographical location? Or: is the issue one of federal law, where the decision by one federal judge will be given respectful consideration by another federal judge, even though they are not in the same district or state?)

(c) Will there be any inclination by the lawyer, or her firm, to "soft-pedal" or de-emphasize certain arguments or issues – which otherwise would be vigorously pursued – so as to avoid impacting the other case?

(d) Will there be any inclination within the firm to alter any arguments for one, or both clients, so that the firm's position in the two cases can be reconciled – and, if so, could that redound to the detriment of one of the clients?

If the lawyer concludes that the issue is of such importance and that its determination in one case is likely to have a significant impact on its determination in the second case, thus impairing the lawyer's effectiveness – or if the lawyer concludes that, because of the dual representation, there will be an inclination by the firm either to "soft-pedal" the issue or to alter the firm's arguments on behalf of one or both clients, thus again impairing the lawyer's

effectiveness – the lawyer should not accept the second representation. The reason is that, in such a situation, the representation of at least one client would be adversely affected if the firm were to proceed with both.[5]

If, on the other hand, even though there is a significant potential for the representation of one client to be limited by the representation of the other, the lawyer nonetheless reasonably believes that the determination in one case will not have a significant impact on the determination of that issue in the second case and that continuing to handle both matters will not cause her, or her firm, to "soft-pedal" the issue or to alter any arguments that otherwise would have been made, the lawyer may proceed with both representations, provided that both clients consent after full disclosure has been made to them of the potential ramifications (including the possibility that the law firm's adversary in one case might become aware, and be able to make advantageous

---

[5] See Fiandaca v. Cunningham, 827 F.2d 825, 829 (1st Cir.1987), where the First Circuit held that, under New Hampshire Rule 1.7 and the Comment thereto (which are based on Model Rule 1.7 and Comment), a law firm has an ethical duty to prevent its loyalties to other clients from coloring its representation of the plaintiffs in this action and from infringing upon the exercise of its professional judgment and responsibility.

Moreover, in such a situation it would seem clear that the law firm will not be able to provide the clients with the "competent representation" required by Rule 1.1.

use, of the briefs filed by the law firm in the other case).

Although the foregoing discussion is predicated on the assumption that the existence of the positional conflict is immediately apparent to the lawyer at the time she is asked to represent the second client, the Committee is of the opinion that the same analysis should be followed if such a conflict emerges after the second representation has been accepted and pursued. If that analysis leads to the conclusion that the law firm should not proceed with both representations, then the law firm must withdraw from one of them.[6]

Finally, although this Opinion began with a consideration of the provisions of the Model Rules, the Committee is of the opinion that the above-stated conclusions also hold true under the Model Code of Professional Responsibility (1969, amended 1980). Disciplinary Rule 5-105(A) states that a lawyer

> shall decline preferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing adverse interests. (emphasis added)

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[6] If possible, the lawyer should determine which of the representations would suffer the least harm as a consequence of the lawyer's withdrawal and then withdraw from that matter.

Disciplinary Rule 5-105(C) provides that a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. (emphasis added)

Hence, insofar as the issue here being considered is concerned, the result should be the same under the Model Code as under the Model Rules.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 N. Fairbanks Court, Chicago, Illinois 60611 Telephone (312)988-5300 CHAIR: David B. Isbell, Washington, DC ☐ Deborah A. Coleman, Cleveland, OH ☐ Ralph G. Elliott, Hartford, CT ☐ Lawrence J. Fox, Philadelphia, PA ☐ Marvin L. Karp, Cleveland, OH ☐ Margaret Love, Washington, DC ☐ Richard McFarlain, Tallahassee, FL ☐ Kim Tayler-Thompson, Stanford, CA ☐ CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Joanne P. Pitulla, Assistant Ethics Counsel

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